United States Department of Labor
Employees' Compensation Appeals Board

A.P., Appellant	)	
and	)	**Docket No. 10-1650**
	)	**Issued: May 2, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Albany, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2010 appellant, through counsel, filed a timely appeal from a May 18, 2010 merit decision of the Office of Workers' Compensation Programs which terminated her entitlement to monetary compensation benefits on the grounds that she had refused an offer of suitable employment. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's entitlement to monetary compensation benefits effective May 18, 2010 on the grounds that she refused an offer of suitable work.

On appeal, appellant's counsel contends that well-rationalized medical opinion supports that appellant did not have the physical or medical ability to perform the offered position.

[1] 5 U.S.C. § 8101 *et seq.*

Termination of her compensation without the benefit of a referee medical examination was improper.

FACTUAL HISTORY

On June 10, 2009 appellant, then a 43-year-old diagnostic radiological technician, filed a traumatic injury claim alleging that on June 8, 2010 she sustained an acute chronic low back strain while helping a patient off the computerized tomography table. By letter dated August 12, 2009, the Office accepted her claim for sprain of back, lumbar region. It paid compensation and medical benefits.

In a September 14, 2009 report, Dr. William H. Montgomery, appellant's treating Board-certified orthopedic surgeon, noted that appellant had a work-related injury and had radiating right groin pain as well as pain that radiated down the leg into her foot where she experienced tingling. He noted that the pain hurt her all time. Dr. Montgomery believed that appellant might have an intrinsic nerve disorder and that he was going to refer her to a neurologist. He noted that he was going to keep her out of work until she was evaluated by the neurologist.

In an October 29, 2009 report, Dr. Jeffrey J. Burdick, a Board-certified neurologist, indicated that appellant described radicular symptoms following an injury initially with severe back pain. He found no evidence of disc herniation on examination. Dr. Burdick suggested further evaluation with an electromyogram (EMG) and nerve conduction study to further evaluate appellant's symptoms.

In a November 10, 2009 attending physician's report, Dr. Burdick listed his findings as facet arthropathy L4-5, L5-5, antalgic gait, limited movement of right lower extremities and osteoarthritis of the right hip. He diagnosed lumbago pain in limb and paresthesias. Dr. Burdick believed that the condition was caused or aggravated by appellant's work activity. He listed her period of total disability as commencing June 8, 2009. Dr. Burdick noted that appellant had not been advised that she could return to work.

The Office referred appellant to Dr. Edwin Mohler, a Board-certified orthopedic surgeon, for a second opinion In a report dated December 18, 2009, Dr. Mohler listed his diagnostic impressions as: (1) status post lumbosacral sprain with recurring right thoracolumbar muscle spasm and paresthesias in the right lower extremity, rule out piriformis syndrome; (2) status post strain of the right hip with recurring arthralgia; and (3) preexisting facet arthropathy of the lumbar spine by radiographic studies. He opined that the accepted condition was still active. Dr. Mohler noted that there was a current disability from work due to appellant's work-related conditions as well as due to her obesity and deconditioning with the facet arthropathy identified in her lumbosacral spine. Appellant could return to work with restrictions and that 50 percent of the restrictions related to the injury of June 8, 2009 and 50 percent related to her deconditioning, obesity and facet arthropathy. Dr. Mohler stated that lumbosacral sprains and muscular strain with appropriate rehabilitation should resolve within one year of the date of the injury. Appellant's preexisting facet arthropathy was a permanent condition and had a natural history of progression. It was best contained by appropriate spinal body mechanics, appropriate body width, good cardiopulmonary and vascular reconditioning by muscle strengthening of the back extensors, hip extensors, abdominals and core strengthening, strengthening of the upper and

lower extremities and in participating in a progressive reconditioning routine. Dr. Mohler noted that, with these factors in place, one would anticipate resolution of the sprain and strain. He completed a work capacity evaluation indicating that appellant was restricted to four hours of sitting and walking; two hours of standing, bending and stooping; one hour of pushing up to 40 pounds, one hour of pulling up to 30 pounds and one hour of lifting up to 20 pounds. Dr. Mohler noted that she could not operate a motor vehicle at work.

The Office also referred appellant to Dr. Patrick J. Hughes, a Board-certified neurologist, for a second opinion. Dr. Hughes opined that she had no objective findings on neurological examination or her imaging studies to substantiate continuing complaints of disabling pain. He concluded that the accepted condition of lumbar strain had resolved by December 2009. Dr. Hughes found no current disability from work due to the accepted conditions or residuals or to claimed factors of employment. He did note that appellant was complaining of neck pain radiating down her arm which would indicate a possible cervical radiculopathy due to cervical spondylosis or a cervical disc which would result in a disability. Dr. Hughes noted that she would need additional diagnostic testing to establish a diagnosis. He advised that any disability would be due to appellant's neck and arm pain and not due to the lumbar strain.

Dr. Burdick interpreted a December 29, 2009 EMG as evincing denervation change in the right lumbosacral paraspinal muscles and in the anterior myotomes consistent with a right S1 radiculopathy. He noted that the nerve conduction portion of the study was normal and without evidence of peripheral neuropathy. In a note of the same date, Dr. Burdick indicated that appellant should remain off work.

On February 25, 2010 the employing establishment made an offer of a full-time temporary alternative-duty assignment for work as a diagnostic radiological technologist performing clerical duties. The position had limitations of four hours of sitting and walking, two hours of standing, bending and stooping, one hour of pushing no more that 40 pounds, one hour of pulling no more than 30 pounds and one hour of lifting no more than 20 pounds. On March 10, 2010 appellant declined the position, stating that she was medically unable to accept it.

In a February 4, 2010 report, Dr. Montgomery stated that he reviewed a new magnetic resonance imaging (MRI) scan that did not show any compression centrally or foraminally. He noted that appellant had pain that radiated into her right and a component of right anterior thigh pain, perhaps piriformis syndrome. Dr. Montgomery noted that he was not exactly sure what was causing the pain and would like her to be seen by one of his nonoperative colleagues.

In a February 10, 2010 note, Dr. Burdick noted that appellant had ongoing pain in her right upper and lower extremity following a work-related accident. He indicated that she should continue physical therapy and Celebrex. In another note of the same date, Dr. Burdick advised that appellant remained under his professional care and was to remain out of work until March 31, 2010.

In a February 17, 2010 report, Dr. Charles J. Buttaci, a Board-certified physiatrist with a subspecialty in pain medicine, saw appellant at the request of Dr. Montgomery. He listed his impression as a June 8, 2009 work-related injury consisting of back pain and ongoing right limb

neuropathic symptoms. Dr. Buttaci noted quite a bit of neuropathic symptoms in appellant's right leg which were limiting her activities at work and at home. He noted no significant neural compression on the MRI scan, but that the EMG was a concern for right S1 radiculopathy. Dr. Buttaci did not believe that appellant could return to full duty.

By letter dated February 25, 2010, the employing establishment offered appellant a temporary alternative-duty assignment as a diagnostic radiological technologist, with physical limitations of sitting and walking four hours, standing, bending and stooping two hours, pushing one hour of no more than 40 pounds, pulling, one hour, limited to no more than 30 pounds and lifting, one hour, limited to no more than 20 pounds. It noted that she would be unable to tolerate repositioning of lifting patients, rather she would perform clerical duties in the Release of Information Unit. On March 10, 2010 appellant rejected the position, contending she was medically unable to accept it.

By letter dated March 25, 2010, the Office informed appellant that it found the clerical position offered as a diagnostic radiological technologist suitable and within her work capabilities. It noted that Dr. Mohler found that she was capable of completing the work duties. The Office informed appellant that she had 30 days to either accept the position or provide an explanation or reasons for refusing it. It explained that, if at the expiration of 30 days she failed to accept the position or an explanation as to why her reasons for refusing the job were justified, her right to further compensation would be jeopardized.

By letter dated March 31, 2010, appellant's attorney contended that appellant was physically and medically unable to accept the offered position, as the duties of the assignment were inconsistent with her medical restrictions and disabilities.

By letter dated April 26, 2010, the Office informed appellant that it found her reasons for rejecting the job invalid and offered her 15 additional days to accept the position. It informed her that, if she did not accept the position, her entitlement to wage loss and schedule award benefits would be terminated.

In an April 30, 2010 report, Dr. Tahir Effendi, a treating Board-certified internist, noted that appellant complained of ongoing pain, numbness and tingling. Electroencephalography studies showed evidence of denervation changes in the right cervical paraspinal muscle and in the anterior myotomes consistent with right C6 radiculopathy. Dr. Effendi found that appellant remained totally disabled.

In a May 5, 2010 medical report, Dr. Burdick listed his impression as ongoing pain in the right upper and lower extremities with associated neck pain following a work-related accident. He believed that both appellant's neck problems and her lower extremity symptoms were related to her work accident which occurred when she was trying to move a patient.

By decision dated May 18, 2010, the Office terminated appellant's compensation benefits effective that date due to her failure to accept suitable employment.

LEGAL PRECEDENT

The Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c)(2) of the Act[3] provide that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[4] The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[5] The Board has held that as monetary compensation payable to an employee under section 8107 are payments made from the Employees Compensation Fund, they are subject to the penalty provision of section 8106(c).[6]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8]

Section 8123(a) of the Act provides in pertinent part: If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[9] Where there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[10]

ANALYSIS

The Office accepted appellant's claim for sprain of the back, lumbar region and paid compensation and medical benefits. The employing establishment offered her a position as a limited-duty diagnostic radiological technologist in accordance with the limitations set forth by one of the second opinion physicians, Dr. Mohler, who found that she could return to work with restrictions. The Office found that this position was suitable, provided proper notice prior to termination of compensation, effective May 18, 2010, due to her failure to accept suitable

[2] *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id*. at § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

[6] *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[7] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

[8] *Id*. at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

[9] 5 U.S.C. § 8123(a).

[10] *William C. Bush*, 40 ECAB 1065, 1075 (1989).

employment. The Board finds that the Office erred in terminating appellant's compensation due to a conflict in medical opinion.

The Office bears the burden of proof to justify imposing the penalty of terminating compensation.[11] It has the burden of showing that the work offered to and refused by appellant was suitable.[12]

Appellant's physicians found that appellant was totally disabled due to her accepted work injury. On September 14, 2009 Dr. Montgomery advised that she was still suffering from the effects of her work injury and he kept her from work until evaluated by a neurologist. He referred appellant to Dr. Burdick for a neurological evaluation. In October 29, 2009 report, Dr. Burdick diagnosed lumbago pain in the limb and paresthesias which he believed was caused or aggravated by her work activity. He stated that appellant was totally disabled and could not return to work. In December 29, 2009 report, Dr. Burdick reiterated that she should remain off work. In February 10, 2010 notes, appellant still had ongoing pain in her right upper and lower extremity following a work-related accident and was to remain off work. On April 30, 2010 Dr. Effendi opined that appellant remained 100 percent totally disabled.

The Office found the weight of medical evidence represented by the report of Dr. Mohler, the second opinion physician. It determined that the position offered by the employing establishment was suitable as it was within the restrictions as set forth by Dr. Mohler. The Board finds that a conflict in medical opinion arose between Dr. Mohler and appellant's attending physicians.[13]

Due to the unresolved conflict in medical opinion, the weight of the evidence does not establish the suitability of the offered position. The Board finds that the Office did not discharge its burden of proof to justify the termination of appellant's monetary compensation under section 8106(c)(2). The Board will reverse the May 18, 2010 decision.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective May 18, 2010 on the grounds that she refused an offer of suitable work. There is an unresolved conflict in medical opinion on whether the position is suitable.

[11] *Curtis Hall*, 45 ECAB 316 (1994).

[12] *Joyce M. Doll*, 53 ECAB 790 (2002).

[13] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2010 is reversed.

Issued: May 2, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board